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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

UNITED STATES OF AMERICA,)	No. CR 07-0344 CW
)	
Plaintiff,)	
)	GOVERNMENT'S SENTENCING
v.)	MEMORANDUM
)	
KENNETH EUGENE HOLLOWAY,)	DATE: April 16, 2008
)	TIME: 2:00 p.m.
Defendant.)	
)	Honorable Claudia Wilken

For the reasons set forth below and in the Presentence Investigation Report (PSR), the government respectfully requests that the Court accept the proposed Plea Agreement and sentence defendant Kenneth Eugene Holloway to 156 months imprisonment consecutive to any other undischarged term of imprisonment, 5 years of supervised release (including a suspicionless search clause as described below), and the \$200 mandatory special assessment.

FACTUAL BACKGROUND

On August 25, 2006, while on federal supervised release, defendant unsuccessfully attempted to flee from Oakland Police officers after he was pulled over with a loaded firearm and 5.6 grams of crack cocaine in his car. During his attempted flight, he entered an innocent

GOVT. SENT. MEM.;
CR 07-0344 CW

1 person's home, trying to hide there. He was arrested shortly thereafter, charged in state court,
2 and somehow released. He absconded.

3 While a fugitive from the state charges, in November 2006 defendant and an accomplice
4 robbed a jewelry store in El Cerrito. After defendant and his accomplice entered that store,
5 defendant pointed a handgun at the owner and ordered the store owner to the back room.
6 Defendant ordered the store owner to lay face down on the floor. Defendant and his accomplice
7 tied up the store owner, including tying cloth in his mouth, then stole approximately \$50,000
8 worth of jewelry and all the cash in the store. Defendant was arrested in March 2007 for this
9 crime, and he has been in custody since then.

10 Defendant's Criminal History

11 Defendant's criminal history runs essentially unbroken from the age of 13 to his current
12 age, 41. When he was 13, defendant received wardship probation after he beat up and robbed a
13 student who refused to give defendant a quarter. (PSR, ¶ 29.) Just a few months later, defendant
14 and three others ganged up on, beat up, and robbed a young girl. (PSR, ¶ 30.) A few months
15 later defendant robbed, yet again, this time for a sweatsuit and cash. (PSR, ¶ 31.) A few months
16 later, now at age 14, defendant robbed a neighbor and allegedly held a gun to a young boy's head
17 during that robbery. (PSR, ¶ 32.) A few months after that, and after an intervening escape from
18 a bus transporting him to juvenile hall, defendant, in the midst of yet another robbery, forced a
19 23-year old female Berkeley student down an alley at gunpoint, apparently to rob her. He took
20 her purse, which contained 75 cents. She turned around, so defendant murdered her so she could
21 not identify him.¹

22 Defendant's mere 5-year incarceration in the California Youth Authority was marked by
23 consistent violent behavior and included raping another ward, threatening to kill another ward,
24 refusing to participate in counseling, and requiring staff to shackle him to his bed as a result of
25 his violent behavior. (PSR, ¶ 35.) As set forth in the PSR, one assessment of his time there was

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27 ¹A few hours later, defendant, still armed with a gun, robbed a liquor store. That charge
28 was dropped, however, as were a vandalism charge and a charge of forcible rape of a 13-year old
girl, all dropped in lieu of the murder plea.

1 as follows:

2 He poses an extreme danger to society. He continues to be highly assaultive and
3 has no respect for the rights of others. He lacks the insight and understanding to
4 express genuine emotions such as remorse for his victim and hatred toward
females. [His] term will expire in November 1987. The thought of this ward
being released in November 1987 is frightening.

5 (PSR, ¶ 35.)

6 Just a few months after his release from CYA, defendant sold crack cocaine to an
7 undercover officer. Defendant pointed the shotgun at the undercover officer and threatened
8 retaliation if defendant learned the officer was, in fact, an officer. In addition to the shotgun,
9 additional crack cocaine, bullets, and a stolen hand grenade were found near defendant. (PSR, ¶
10 36.) Defendant received a sentence of 100 months for this crime; he appears to have served
11 about 64 months of that sentence.

12 A few years later, defendant and two accomplices committed an armed bank robbery.
13 Defendant dragged the bank manager across the room and struck another employee with the butt
14 of the semi-automatic pistol he was carrying. After defendant was convicted of bank robbery,
15 carrying a firearm in furtherance of a violent crime, and being a felon in possession of a firearm,
16 this Court sentenced him to 30 years in prison. Unfortunately, the bank robbery and 924(c)
17 counts were reversed by the Ninth Circuit. Upon remand, this Court sentenced defendant to the
18 maximum term allowable: 10 years in federal prison followed by three years of supervised
19 release.

20 A few months after his release from that sentence, defendant committed the instant
21 offense. Then, a few months after that, he committed the above-described armed robbery of the
22 jewelry store on San Pablo Avenue in El Cerrito.²

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26 ²Apparently almost immediately after the Plea Agreement in this case was entered,
27 defendant pleaded guilty in state court, agreeing to a sentence of 164 months. He has not yet
28 been sentenced in state court. Undersigned government counsel's understanding, however, is
that sentence will run concurrently to the federal sentence and that, as a result, defendant will
serve little or no additional time for that crime.

The Sentencing Guidelines

As the parties agreed in the Plea Agreement and as the Probation Officer determined, there is no dispute that the total offense level for Count One (possession with intent to distribute 5.6 grams of crack cocaine) is 21. The Probation Officer correctly determined defendant's Criminal History Category to be V, resulting in a guidelines range of imprisonment of 70-87 months. Adding the mandatory minimum consecutive 60 months for Count Three (possessing a firearm in furtherance of a drug trafficking crime) would result in a range of 130-147 months. If ever there were a case of understated criminal history, however, this is it. Defendant has six convictions for violent crimes, including murder, that add a combined total of zero points to his criminal history score. Defendant does not meet the technical requirements of being an Armed Career Criminal or a Career Offender, though the reality is that he is both. His criminal history should be considered to place him in Criminal History Category VI. If defendant's Criminal History Category were VI, his range would be 77-96 months, plus a minimum consecutive 60 months, or a low-end range of 137-156 months.

In addition, defendant violated his terms of supervised release by committing both the instant offense and the jewelry store robbery. The guideline range of imprisonment for these Grade A violations is 15-21 months, and that is after defendant gets the benefit of his criminal history as of 1997, which appears to have been Category II. Adding the 15-21 months to the 137-156 months noted above, an appropriate *low-end* overall guideline range would be 152-177 months. Indeed, defendant has agreed that he should be sentenced to a range of imprisonment of 144-156 months. Given his conduct in this case and his criminal history, he should be sentenced to a term of 156 months imprisonment.

Additional Supervised Release Condition Number 6 Should be Modified

Furthermore, as one of the conditions of his supervised release, defendant should be subject to search at any time with or without cause. On page 4 of the "Sentencing Recommendation" attached to the PSR, the Probation Officer suggests that defendant, while on supervised release, shall submit to a search by a Probation Officer based on "reasonable suspicion". (Additional Condition 6.) Considering this defendant's criminal history and his

conduct in this case, and in light of the Ninth Circuit's decision in United States v. Betts, 511 F.3d 872 (9th Cir. Dec. 14, 2007), the search clause applicable during defendant's term of supervised release should be expanded. Specifically, the government submits that this condition should read as follows:

The defendant shall submit his person, residence, office, vehicle, or any property under his control to a search. Such a search shall be conducted by a United States Probation Officer or any federal, state, or local law enforcement officer at any time with or without cause. Failure to submit to such a search may be grounds for revocation; the defendant shall warn any residents that the premises may be subject to searches.

In Betts, the Ninth Circuit upheld a substantially similar (and, the government submits, identical in effect) search clause, even though the defendant in that case had *no criminal history*. In doing so, the Ninth Circuit relied on Samson v. California, 126 S.Ct. 2193 (2006), which held that a similarly worded condition imposed upon all parolees in California did not violate the Fourth Amendment even though the condition did not require reasonable suspicion. Betts, 511 F.3d at 876 (citing Samson, 126 S.Ct. at 2202). The Ninth Circuit noted that in Samson, the Supreme Court had considered the high risk of recidivism for people convicted of crimes and reasoned that a reasonable suspicion requirement would give parolees greater opportunity to anticipate searches and hide criminal conduct. Betts, 511 F.3d at 876 (citing Samson, 126 S.Ct. at 2201). Because there was "no sound reason for distinguishing parole from supervised release" with respect to this condition, and noting that the Court in Samson even drew the analogy to supervised release, the expansive search condition not requiring reasonable suspicion was appropriate. Id. See also United States v. Hanrahan, 508 F.3d 962 (affirming the imposition of a suspicionless search condition of supervised release after felon-in-possession conviction).

Such a condition is appropriate here as well. As set forth above, defendant's criminal history is remarkably constant and severe. While he is serving the portion of his sentence that is his term of supervised release, no law enforcement officer should need reasonable suspicion to search him.

CONCLUSION

For these reasons, the government respectfully requests that this Court sentence the

1 defendant to 156 months imprisonment (96 months on Count One, 60 months on Count Three to
2 be served consecutively to Count One, and 21 months on the supervised release violation to be
3 served concurrently with Count Three, for a total term of imprisonment of 156 months
4 consecutive to any other undischarged term of imprisonment), 5 years of supervised release, and
5 the \$200 special assessment.

6 DATED: April 11, 2008

Respectfully submitted,

7 JOSEPH P. RUSSONIELLO
8 United States Attorney

9 /s/
10 W. DOUGLAS SPRAGUE
11 Assistant United States Attorney
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